No. 82-272

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

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SUPREME COURT, U.S.

STATE OF MISSOURI,

Petitioner,

vs.

WILLIAM McKINNEY, JR.,

Respondent.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Reasons for Denying the Writ

1. The decision below rests solely or in addition to the federal constitutional ground upon a state statutory ground, i.e. that §§556.041(1) and 556.046.1(1), RSMo 1978, prohibit conviction for armed criminal action and the underlying felony, when the underlying felony is established by proof of the same or less than all the facts required to prove armed criminal action 1

2. If this Court cannot determine whether the decision below rests upon a federal constitutional or an adequate and independent state statutory ground, then counsel requests that it vacate the judgment below and remand the case to the Missouri Court of Appeals, Western District, to consider whether its judgment rests upon the federal constitution, state statutes, or both grounds 6

Conclusion 8

TABLE OF AUTHORITIES

Cases	Pages
California v. Krivada, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972)	7
Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945)	5
Illinois v. Vitale, 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 645 (1978)	7
Missouri v. Hunter, No. 81-1214	2
Missouri v. Kane, No. 81-2117	3, 4, 5
Sours v. State (Sours I), 593 S.W.2d 208 (Mo. banc 1980)	1
Sours v. State (Sours II), 603 S.W.2d 592 (Mo. banc 1980).	1
State v. Arnold, 628 S.W.2d 665 (Mo. 1982)	3, 4
State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981)	1
State v. Hunter, 622 S.W.2d 374 (Mo. App. 1981)	2
State v. Kane, 629 S.W.2d 370 (Mo. App. 1981)	3, 4, 5
State v. Kane, 629 S.W.2d 372 (Mo. banc 1982)	3, 4
State v. McKinney, 633 S.W.2d 164 (Mo. App. 1982)	1, 3
State v. Thompson, 629 S.W.2d 361 (Mo. App. 1981)	3
State v. Thompson, 629 S.W.2d 369 (Mo. banc 1982)	3
State ex rel. Westfall v. Ruddy, 621 S.W.2d 42 (Mo. banc 1981)	2, 3, 4, 5, 6
Constitutional Provisions	
United States Constitution, Fifth Amendment	2, 7
Statutes	
28 U.S.C. §1257	2
Section 559.225, RSMo Supp. 1976	1
Section 571.015, RSMo 1978	1, 6
Section 556.041, RSMo 1978	i, 1, 2, 5, 7
Section 556.046, RSMo 1978	i, 1, 2, 5, 7
Session Laws	
S.B. 60, 79th General Assembly, 1st Session, Laws of Mo. 1977, p. 658.	2

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent WILLIAM McKINNEY, JR. respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Missouri Court of Appeals, Western District, opinion in this case.

REASONS FOR DENYING THE WRIT

1. The decision below rests solely or in addition to the federal constitutional ground upon an adequate and independent state statutory ground, i.e. that §§556.041(1) and 556.046.1(1), RSMo 1978, prohibit conviction for armed criminal action and the underlying felony, when the underlying felony is established by proof of the same or less than all the facts required to prove armed criminal action.

Petitioner asserts that the decision below -- State v. McKinney, 633 S.W.2d 168 (Mo. App. 1982) -- reversing respondent's conviction for armed criminal action, §571.015, RSMo 1978, rests solely upon an erroneously decided federal constitutional ground. Petitioner asserts that the decisions below were decided under the authority of State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981), Sours v. State (Sours II), 603 S.W.2d 592 (Mo. banc 1980) and Sours v. State (Sours I), 593 S.W.2d 208 (Mo. banc 1980), holding the multiple punishment provision of Missouri's virtually identical predecessor armed criminal action statute, §559.225, RSMo Supp. 1976, violative of the multiple

punishment for the same offense protection of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Those decisions are presently being reviewed upon the merits by this Court in Missouri v. Hunter, No. 81-1214 (U.S. April 5, 1982), granting Missouri's petition for certiorari in State v. Hunter, 622 S.W.2d 374 (Mo. App. 1982).

Assuming, but not conceding, for the sake of argument that the multiple punishment provision of Missouri's armed criminal action statute is constitutional and Haggard, Sours I and Sours II are erroneously decided, the decision below, reversing respondent's conviction for armed criminal action, rests upon a state ground, sufficiently adequate and independent of the federal constitutional ground to prevent this Court from acquiring jurisdiction under 28 U.S.C. §1257 to review the decision below. This assumption solely for the sake of argument is a device to clarify the dispositive issue in this case, and is not, as Missouri characterizes it, "nothing more than an acknowledgment that his [respondent's] position on the constitutional issue ... is utterly hopeless." Petition for Certiorari, 9. There has been filed in Missouri v. Hunter, No. 82-1214, a brief on the merits supporting the Missouri Supreme Court's reversal of armed criminal action convictions upon double jeopardy grounds.

The adequate and independent state ground upon which the decision below rests is that §§556.041(1) and 556.046.1(1), RSMo 1978, prohibit conviction for armed criminal action and the underlying felony, when the underlying felony is established by the same or less than all the facts required to prove armed criminal action. See, State ex rel Westfall v. Ruddy, 621 S.W.2d 42, 43-45 (Mo. banc 1981). Sections 556.041 and 556.046, RSMo 1978, did not exist prior to January 1, 1979 (S.B. 60, 79th General Assembly, 1st Session, Laws of Mo. 1977, pp. 665, 718) and thus were not available as a ground for reversing convictions for armed criminal action offenses committed prior to that date. Therefore, the Missouri Supreme Court's reversals of the armed criminal action convictions in Haggard, Sours I and Sours II rest only upon a federal constitutional ground, and the

Missouri Court of Appeals, Western District, reversal in respondent's case and the Missouri Supreme Court's reversal of the respondents' conviction for armed criminal action in Missouri v. Kane, No. 82-2117 (petition for certiorari filed May 7, 1982), rests solely or also upon an adequate and independent state ground.

Missouri has characterized this argument as a lie, to put it in plain words, by claiming "counsel [the undersigned writer] for the respondents in Missouri v. Kane, No. 81-2117 ... rather disingenuously argued," Petition for Certiorari, 5, the existence of an adequate and independed state ground as a basis for denying certiorari therein. This argument is not a lie, fabricate by counsel. Though the court below expressed a federal constitutional reason for reversal of the armed criminal action conviction, the state statutory basis for the court's decision can be understood from its citations, McKinney, supra, 633 S.W.2d at 165-166, to State v. Kane, 629 S.W.2d 370 (Mo. App. 1981), State v. Kane, 629 S.W.2d 372 (Mo. App. 1982), State v. Thompson, 629 S.W.2d 361 (Mo. App. 1981) and State v. Thompson, 629 S.W.2d 369 (Mo. banc 1982) and an analysis of State v. Arnold, 628 S.W.2d 665 (Mo. 1982).

The reason expressed by the Missouri Court of Appeals in its opinion filed August 6, 1981 for reversing one of the two convictions in Kane was:

> The determination of defendant's first two points is therefore controlled by State ex rel. Westfall v. Ruddy, 621 S.W.2d 42 decided by the Missouri Supreme Court en banc July 23, 1981.

State v. Kane, 629 S.W.2d 370, 371 (Mo. App. 1981) (emphasis added). No federal constitutional reason was given. If Kane was decided upon a constitutional ground, then Sours I and Sours II (Haggard had not yet been decided) would have been cited. They were not. The court below also did not cite Sours I and Sours II. The reason expressed by the Missouri Court of Appeals in its opinion filed March 30, 1981 (prior to the Ruddy decision date) for reversing one of the two convictions in Thompson was a federal constitutional one. State v. Thompson, 629 S.W.2d 361, 369 (Mo. App. 1981). The state statutory ground was not discussed. The court changed its federal constitutional reason to a state statutory one, however, when it transferred the case to the Missouri Supreme Court on

August 18, 1982 (subsequent to the Ruddy and Kane decision dates) "for the reason set forth in the opinion filed in State v. Anthony Kane, WD 31611 (opinion filed August 6, 1981)." Missouri v. Kane, No. 81-2117, Brief in Opposition, A1. The reason the court transferred Kane was for the Missouri Supreme Court to decide whether the armed criminal action or the underlying felony conviction should be reversed. Kane, supra, 629 S.W.2d at 371-372.[1]

The reason expressed by the Missouri Court of Appeals in its opinion filed March 30, 1981 (the same date as its decision in Thompson and prior to the decision date of Ruddy) for reversing one of the two convictions in Arnold was a federal constitutional one. Missouri v. Kane, No. 81-2117, Petition for Certiorari, A71. The state statutory ground was characterized as "totally without merit." Missouri v. Kane, No. 82-2117, Petition for Certiorari, A70. The case was transferred that day to the Missouri Supreme Court, Missouri v. Kane, No. 81-2117. Brief in Opposition, A2, for it to determine whether an argument by the prosecuting attorney was a comment upon the defendant's right not to testify. Missouri v. Kane, No. 81-2117, Petition for Certiorari, A65, A71, A76-79. Thus the Missouri Court of Appeals did not have an opportunity to consider Arnold in the light of Ruddy, and the Missouri Supreme Court had no reason to consider Arnold in the light of Ruddy, since the case was transferred to it for another reason. And, it must be noted, three of the five Missouri Supreme Court justices who joined in the opinion in Arnold (the remaining two were special justices) joined in the opinion in Ruddy. Arnold, supra, 628 S.W.2d at 666, 671; State ex rel. Westfall v. Ruddy, supra, 621 S.W.2d at 45.

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[1]While realizing that it could elect either the remedy of reversing the underlying felony conviction or remanding the case for a new trial so that the jury could chose for which offense it would convict and assess punishment, the Missouri Supreme Court elected the remedy of reversing the armed criminal action conviction. The court interpreted juries' assessment of the greater punishment upon the underlying felony rather than upon the armed criminal action "in excess of ninety-five percent of the cases" to mean that juries believed they were enhancing the greater sentence for the underlying felony. Kane, supra, 629 S.W.2d at 373, 377.

The Missouri Court of Appeals in respondent Kane's case accepted the state statutory ground, because it cited Ruddy and not Sours I or Sours II (Haggard had not yet been decided) as the cases controlling both of respondent Kane's arguments (statutory and federal constitutional) for reversing one of his convictions. Kane, supra, 629 S.W.2d at 371. The Missouri Court of Appeals in respondent Thompson's case made no reference to the state statutory ground, but changed its federal constitutional reason to a state statutory one when it transferred the case to the Missouri Supreme Court for the same reason Kane was transferred. Missouri v. Kane, No. 81-2117, Brief in Opposition, A1. The Missouri Court of Appeals in respondent Arnold's case rejected the state statutory ground as "totally without merit," because it was controlled by Sours I and Sours II (Haggard, had not yet been decided). Missouri v. Kane, No. 81-2117, Petition for Certiorari, A70-71. It was this holding upon the state statutory ground in the intermediate state appellate court's opinion in respondent Arnold's case that the Missouri Supreme Court specifically disapproved in Ruddy.

> In State v. Upshaw (Mo. App. 1981) [W.D. No. 31443], and State v. Arnold, a case transferred after opinion by the Missouri Court of Appeals, Western District, now pending in this Court as No. 62999, the court of appeals rejected an argument that, under §§556.041(1) and 556.046.1(1), an accused could not be prosecuted and convicted of the underlying felony and armed criminal action. That holding was not necessary to the result, because the Court of Appeals, in both instances, vacated the armed criminal action conviction and sentence under Sours I and II anyway.

State ex rel. Westfall v. Ruddy, supra, 621 S.W.2d at 45.

This Court "will not review judgments of state courts that rest upon adequate and independent state grounds. ... [Its] only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. ... We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

In summary, then, the petition for a writ of certiorari should be denied, because the decision below rests upon an adequate and independent state statutory ground, i.e. that §§556.041(1) an §556.046.1(1), RSMo 1978, prohibit conviction for both armed criminal action and the underlying felony, when the underlying felony is established by proof of the same or less than all the facts required to prove armed criminal action. See, State ex rel. Westfall v. Ruddy, supra, 621 S.W.2d at 43-45. That the decision below is based upon this state statutory ground is evidenced by the court below citing to the the two Kane and the two Thompson decisions, rather than Sours I and Sours II. Secondly, it is evidenced by the intermediate state appellate court holding in Kane that Ruddy rather than Sours I and Sours II controlled both the state statutory and the federal constitutional grounds, and the Missouri Supreme Court's approval of that result. Thirdly, it is evidenced by the intermediate state appellate court in Thompson making a federal constitutional holding and subsequently after Ruddy and Kane were decided changing its holding to a state statutory one by transferring the case to the Missouri Supreme Court for the same reason it transferred Kane, and the highest state court approving, as it did in Kane, of the result. Finally, it is evidenced by the intermediate state appellate court making a federal constitutional holding in Arnold and rejecting the state statutory ground, and the Missouri Supreme Court subsequently specifically disapproving of the intermediate court rejection of the state statutory ground.

2. If this Court cannot determine whether the decision below rests upon a federal constitutional or on adequate and independent state statutory ground, then counsel requests that it vacate the judgments below and remand the cases to the Missouri Court of Appeals, Western District, to consider whether its judgment rests upon the federal constitution, state statutes, or both grounds.

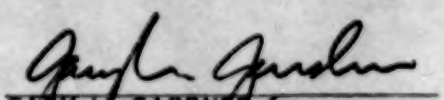
Petitioner assets that the decision below, reversing respondent's conviction for armed criminal action, §571.015, RSMo 1978, rests

solely upon an erroneous interpretation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution -- a federal constitutional ground. Respondent asserts that the decision below rests solely or in addition to the federal constitutional ground upon an adequate and independent state statutory ground, i.e. that §§556.041(1) and 556.041.1(1), RSMo 1978, prohibit conviction for armed criminal action and the underlying felony, when the underlying felony is established by proof of the same or less than all the facts required to prove armed criminal action. See, State ex rel. Westfall v. Ruddy, 621 S.W.2d 42, 43-45 (Mo. banc 1981). If this Court cannot determine whether the decision below rests upon a federal constitutional or an adequate and independent state statutory ground, then counsel requests that this Court vacate the judgments below and remand the case to the Missouri Court of Appeals, Western District, to consider whether its judgment rests upon the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, or §§556.041(1) and 556.046.1(1), RSMo 1978, or upon both grounds. California v. Krivda, 409 U.S. 33, 35, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972); Illinois v. Vitale, 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 645 (1978).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied or in the alternative the judgment below should be vacated and the case remanded to the Missouri Court of Appeals, Western District, to consider whether its judgment rests upon the federal constitution, state statutes, or both grounds.

Respectfully submitted,



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William McKinney, Jr.

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CERTIFICATE OF SERVICE

I, GARY L. GARDNER, a member of the Bar of this Court and counsel of record for respondent William McKinney, Jr., hereby certify, pursuant to Rule 28, that on the 1st day of September, 1982, I served one copy of respondent's Motion for Leave to Proceed in Forma Pauperis and Respondent's Brief in Opposition on the State of Missouri, petitioner herein, by depositing such copies in a United States mailbox, first-class postage prepaid, addressed to Philip M. Koppe, Assistant Attorney General, 615 East 13th Street, Room G-20, Kansas City, Missouri 64106.

All parties required to be served have been served.

Dated September 1, 1982.

Respectfully submitted,

GARY L. GARDNER for
William McKinney, Jr.

JAMES W. FLETCHER
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Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now WILLIAM McKINNEY, JR., respondent herein, by and through his court appointed attorney, and moves this Honorable Court for leave to file his Brief in Opposition without prepayment of costs, if any, and to proceed in forma pauperis herein pursuant to Rule 46. Respondent sought from the Circuit Court of Jackson County, Missouri, the trial court below, leave to perfect his appeal to the Missouri Court of Appeals, Western District, in forma pauperis, and such leave was granted.

Respectfully submitted,

GARY L. GARDNER for
William McKinney, Jr.

JAMES W. FLETCHER
Public Defender

GARY L. GARDNER
Assistant Public Defender
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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, WILLIAM McKINNEY, JR., being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe the State of Missouri is not entitled to redress; and that I desire to oppose the issues raised by the State in its petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instruction below relating to my ability to pay the costs of responding to the petition are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Answer:

No

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Answer:

No

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned.

Answer:

No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. If the answer is yes, describe the property and state its approximate value.

Answer:

No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer:

No

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

William McKinney, Jr.
WILLIAM McKINNEY, JR.

SUBSCRIBED AND SWORN TO before me this ___ day of SEP 1 1982 1982.

Oscar D. Dunbar
Notary Public

OSCAR D. DUNBAR
Notary Public, State of Missouri
My Commission Expires August 1, 1984

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CERTIFICATE OF SERVICE

I, GARY L. GARDNER, a member of the Bar of this Court and counsel of record for respondent William McKinney, Jr., hereby certify, pursuant to Rule 28, that on the 9th day of September 1982, I served one copy of respondent's Affidavit in Support of Motion to Proceed in Forma Pauperis on the State of Missouri, petitioner herein, by depositing such copies in a United States Mailbox, first-class postage prepaid, addressed to Philip M. Koppe, Assistant Attorney General, 615 East 13th Street, Room G-20, Kansas City, Missouri 64106.

All parties required to be served have been served.

Dated September 9, 1982.

Respectfully submitted,

Gary L. Gardner

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